IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 70-112

JAMES E. GROPPI,
Petitioner,

v.

JACK LESLIE, SHERIFF OF DANE COUNTY,
Respondent.

No. 70-112

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

QUESTIONS PRESENTED

1. Where a person engages in disorderly conduct in the immediate view of a house of a state legislature, tending to interrupt its proceedings, does the passage of a resolution of contempt, and commitment thereunder for a maximum of six months, without further formal charges, notice or hearing, deny the contemnor due process of law?

2. Does due process require that a legislative resolution of contempt set forth more "underlying facts and circumstances" than were included in the Wisconsin Assembly's resolution?

STATEMENT OF THE CASE

On October 1, 1969, the State Assembly of Wisconsin passed a resolution reciting that petitioner Groppi had led a gathering of people onto the floor of the Assembly two days earlier (September 29, 1969) and that petitioner's conduct in so doing violated an Assembly rule and prevented the Assembly from conducting its business. The resolution found that petitioner's conduct constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and further found the petitioner to be in contempt of the Assembly, said contempt being punishable by the Assembly under Article IV, Section 8 of the Wisconsin Constitution and sec. 13.26 (1) (b) of the Wisconsin Statutes. (See addendum to this brief for complete text of the Assembly resolution, constitutional and statutory provisions.) Petitioner Groppi was arrested on the same day the resolution was passed and imprisoned in the Dane County, Wisconsin, jail pursuant to the direction of the resolution that he be imprisoned for a period of six months or for the duration of the then current session of the legislature, "whichever is briefer."

The petition for a writ of habeas corpus alleged, and the respondent admitted, that the contempt resolution was passed and carried into execution without formal notice served on the petitioner and without his presence at or participation in any of the proceedings of the Assembly leading thereto.

Within forty-eight hours after his arrest and confinement, petitioner commenced a civil action in the United States District Court for the Western District of Wisconsin for a declaratory judgment of the constitutionality of Wisconsin Statutes, secs. 13.26 and 13.27, pursuant to which the Assembly had acted in imprisoning him for contempt. He sought a temporary restraining order in connection therewith,

the effect of which would be to release him from confinement pending determination of the merits of the declaratory judgments action.

On Monday, October 6, 1969, the District Court denied the motion for a temporary restraining order on the ground that it would be the equivalent of a writ of habeas corpus which the District Court had no power to issue before petitioner's state remedies had been exhausted. That court issued a *caveat* that it would consider state corrective process ineffective if it did not afford a determination of petitioner's claims "with extraordinary promptness." (A. 37a)

On the same day, a petition for a writ of habeas corpus in petitioner's behalf was filed in Dane County Circuit Court, which ordered the filing of a response and a hearing on the issues the following morning, Tuesday, October 7. Following the hearing in Circuit Court, the matter was taken under advisement; petitioner's attorneys filed a petition for bail and for leave to commence an original action for a writ of habeas corpus in the Wisconsin Supreme Court without waiting for the determination of the Circuit Court.

On Wednesday, October 8, 1969, the Dane County Circuit Court entered an opinion and order denying the petition therein for a writ of habeas corpus and petitioner's attorneys on the same day filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Wisconsin. The District Court immediately issued an order requiring a response to the petition to be filed within three days.

On Friday, October 10, 1969, the Wisconsin Supreme Court, having earlier granted petitioner leave to amend his petition for a writ of habeas corpus in that court, heard oral arguments on the petition and took the case under

advisement. Later in the same day, the Wisconsin Supreme Court issued an order denying the petition. The response to Father Groppi's federal petition was filed on the following day, Saturday, October 11, 1969, and petitioner was admitted to bail by the District Court within hours thereafter. Petitioner remained free on bail until April 8, 1970, when he was discharged from custody on the order of the District Court.

Respondent appealed, and on October 28, 1970, the Court of Appeals for the Seventh Circuit reversed: Following rehearing *en banc*, that court affirmed the earlier decision, three judges dissenting. This judgment of the Court of Appeals *en banc* was handed down on January 6, 1971, one day before the *sine die* adjournment of the 1969 session of the Wisconsin legislature. The session having ended, petitioner could no longer be imprisoned under the contempt resolution. (Sec. 13.26 (2), Wis. Stats.)

SUMMARY OF ARGUMENT

I

American legislatures, national and state, have possessed and exercised the power to punish for contempt since colonial times.

Due process of law does not require that this power be exercised in conformity with any rigid procedural formulation; due process is accorded if the legislative body employs procedures available to and traditionally employed in courts, since, in contempt matters, both courts and legislatures are needful of similar protection and possess equally the means to protect themselves from forcible interference with their functions. There are no differences between courts and legislatures which require, in cases of *direct* contempt, that the contemnor be accorded greater procedural protection in a legislative chamber than he would be constitutionally entitled to receive in a courtroom setting.

The forcible disruption or "take-over" of a legislative chamber poses a greater threat to representative government than the forcible disruption of a single courtroom; certainly the need for a speedy and effective contempt procedure is no less in a legislative setting than in the courtroom.

II

Petitioner's challenge to the sufficiency of the resolution is new; it was not made previously in any state or federal court.

The incorporation into a contempt resolution of "underlying facts and circumstances" is not required by the Constitution. Rule 42 (a) of the Federal Rules of Criminal Procedure is not a codification of any constitutional principle.

In any event, the Wisconsin Assembly's resolution contains a recitation of evidentiary facts which leaves no doubt of the time, place and nature of the offense. It is in no sense "purely conclusionary."

ARGUMENT

I. Like Courts, Legislative Bodies Possess Power To Punish Summarily For Contempts Committed In Their Presence; Exercise Of That Power Does Not Deny Due Process.

A. National and state legislatures have always had contempt powers

Until this Court decided *Jurney v. MacCracken*, (1935) 294 U.S. 125, 79 L. ed. 802, 55 S. Ct. 375, the power of Congress to impose punishment for a contempt of one of its houses was in considerable doubt. The early case of *Anderson v. Dunn*, (1821) 6 Wheaton 204, 5 L. ed. 242, declared in strong terms that the power to punish for contempt was inherent in the nature of the legislative

body, and that to deny the power "leads to the total annihilation of the power of the house of representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption as rudeness, caprice, or even conspiracy, may meditate against it."

The Circuit Court for the District of Columbia, in *Ex Parte Nugent,* (1848) Brunner, Col. Cas. 296, Fed. Cas. No. 10,375, held:

> "The jurisdiction of the senate in cases of contempt of its authority depends upon the same grounds and reasons upon which the acknowledged jurisdiction of other judicial tribunals rests, to wit, the necessity of such a jurisdiction to enable the senate to exercise its high constitutional functions—a necessity at least equal to that which supports the like jurisdiction which has been exercised by all judicial tribunals and legislative assemblies in this country from its first settlement, and in England from time immemorial. That the senate of the United States may punish contempts of its authority seemed to be admitted by the prisoner's counsel, provided it be in a case within their cognizance and jurisdiction: but whether admitted or not, such is the law as laid down by the supreme court of the United States in Anderson v. Dunn, 6 Wheat. [19 U.S.] 224; and in Kearney's Case, 7 Wheat. [20 U.S.] 41."
>
> (It is worthy of note that the court in *Nugent* gave its express approval to *secret* contempt proceedings.)

Kilbourn v. Thompson, (1881) 103 U. S. 168, 26 L. ed. 377, questioned some of the positive language in *Anderson v. Dunn,* supra, but expressly declined to pass upon the existence or non-existence of congressional power to punish

contempts in aid of the legislative function. (The reasoning found in *Kilbourn* has, in turn, been sharply questioned; see Potts, *Power of Legislative Bodies to Punish for Contempt,* 74 U. of Pa. L. Rev. 691, 692-699, 791-792.)

Marshall v. Gordon, (1917) 243 U.S. 521, 61 L. ed. 881, 37 S. Ct. 448, held void a commitment for indirect contempt of Congress where the allegedly contumacious act was deemed not to be of a character to obstruct the legislative process. By dictum, however, the court conceded the inherent right of Congress to punish "physical obstruction of the legislative body in the discharge of its duties."

Then Justice Brandeis, writing for a unanimous Court in *Jurney v. MacCracken,* supra, collected all of the pertinent authorities on the point to that time and resolved the doubts that had previously existed respecting the power of Congress to punish for contempt in aid of a legislative function. Mr. Justice Brandeis wrote:

> "The power of either House of Congress to punish for contempt was not impaired by the enactment in 1857 of the statute, Rev. Stat. § 102, U.S.C. title 2, § 192, making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor. Compare Sinclair v. United States, 279 U.S. 263, 73 L. ed. 692, 49 S. Ct. 268. The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses. That the purpose of the statute was merely to supplement the power of contempt by providing for additional punishment was recognized in Re Chapman, 166 U.S. 661, 671, 672, 41 L. ed. 1154, 1159, 1160, 17 S. Ct. 677: 'We grant that Congress could not divest itself or either of its

Houses, of the essential and inherent power to punish for contempt in cases to which the power of either House properly extended; but because Congress, by the Act of 1857, sought to aid each of the Houses in the discharge of its constitutional functions, it does not follow that any delegation of the power in each to punish for contempt was involved; and the statute is not open to objection on that account.' Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offence. * * *

"The main contention of MacCracken is that the so-called power to punish for contempt may never be exerted, in the case of a private citizen, solely *qua* punishment. The argument is that the power may be used by the legislative body merely as a means of removing an existing obstruction to the performance of its duties; that the power to punish ceases as soon as the obstruction has been removed, or its removal has become impossible; and hence that there is no power to punish a witness who, having been requested to produce papers, destroys them after service of the subpoena. The contention rests upon a misconception of the limitations upon the power of the Houses of Congress to punish for contempt. It is true that the scope of the power is narrow. No act is so punishable unless it is of a nature to obstruct the performance of the duties of the legislature. There may be lack of power, because, as in Kilbourn v. Thompson, 103 U.S. 168, 26 L. ed. 377, there was no legislative duty to be performed; or because, as in Marshall v. Gordon, 243 U.S. 521, 61 L. ed. 881, 37 S. Ct. 448, L.R.A. 1917F, 279, Ann. Cas. 1918B, 371, the act complained of is deemed not to be of a character to obstruct the legislative process. But, where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible is without legal significance.

> "The power to punish a private citizen for a past and completed act was exerted by Congress as early as 1795; and since then it has been exercised on several occasions. It was asserted, before the Revolution, by the colonial assemblies, in imitation of the British House of Commons; and afterwards by the Continental Congress and by state legislative bodies. * * *"

The power of Congress to punish contemtp in a proper case has never since been denied by this Court although, as noted in *Watkins v. United States,* (1957) 354 U.S. 178, 1 L. ed. 2d 1273, 77 S. Ct. 1173, "since World War II, the Congress has practically abandoned its original practice of utilizing the coercive sanction of contempt proceedings at the bar of the House. * * * The Congress has instead invoked the aid of the federal judicial system in protecting itself against contumacious conduct." (In *Watkins,* the Court reversed a conviction for statutory contempt on the grounds that the pertinency of the questions which the defendant had refused to answer had not been made clear to the defendant. At the beginning of the opinion of the Court, written by Mr. Chief Justice Warren, a careful distinction is made between the contempt under consideration and "the case of a truculent or contumacious witness who refuses to answer all questions or who, by boisterous or discourteous conduct, disturbs the decorum of the committee room.")

As to the power of state legislative bodies to commit for contempts before them, there has been a singular unanimity of opinion in the courts that such power exists, either inherently, from the nature of the body and the necessity which gives rise to the exercise of that power, or by constitutional grant of the power, as in Article IV, Section 8, Wisconsin Constitution. We are unable to find a single report denying the existence of the power of a state legislative body to commit a person for contemptuous acts

committed in the view of that body and which tend to interrupt or obstruct its proceedings. A partial listing of the opinions recognizing the contempt powers of state legislative bodies follows:

Lowe v. Summers, (1897) 69 Mo. App. 637: the court held that the legislature's power to punish for contempt was inherent in the legislature in the exercise of its constitutional duties; that the Constitution, in separating legislative and judicial functions, did not take such power away from the legislature.

People ex rel. McDonald v. Keeler, (1885) 99 N.Y. 463, 2 N.E. 615: the power to commit or punish for contempt which had been exercised by Parliament in England was vested in the senate and assembly of New York, either by virtue of the adoption of the common law, or by reason of such power being inherent in legislative bodies.

In Re Gunn, (1893) 50 Kan. 155, 32 P. 470: "it [the house] has full power to punish for contempt any witness who refuses to appear when personally subpoenaed in an election contest, or other proper proceedings pending. It has also the power to protect itself from disorder, disturbance, or violence. * * * It is a body or house 'having authority to commit.' "

Burnham v. Morrissey, (1859) 14 Gray (Mass.) 226, 74 Am. Dec. 767: power of the Massachusetts legislative assembly to commit for contempt a person refusing to produce his books before a legislative investigating committee upheld.

Ex Parte McCarthy, (1866) 29 Cal. 395: the state senate had inherent contempt powers under parliamentary law, affirmed by statute.

Ex Parte Dalton, (1886) 44 Ohio St. 142, 5 N. E. 136: the Ohio general assembly possessed inherent power, aided by statute, to commit for contempt a clerk of court who refused to produce records before an investigating committee.

Ex Parte Parker, (1906) 74 S.C. 466, 55 S.E. 122: upholding imprisonment of a witness for contempt of a joint committee of the state legislature, the witness having refused to testify. "* * * It is to be observed the Congress possesses no powers of legislation except those conferred by the Constitution of the United States, while the general assembly is invested with all the legislative power of the state except that denied by the Constitution."

Canfield v. Gresham, (1891) 82 Tex. 10, 17 S.W. 390: upholding the imprisonment of a reporter who attempted to enter the House against its order, for obstructing the proceedings of the legislature, and his arrest and commitment by the sergeant-at-arms, saying: "The House had unquestionably the right to determine whether or not the acts of plaintiff were an obstruction to its proceedings within the meaning of the Constitution, and, having so determined, to cause him to be imprisoned as he was."

In Re Falvey, (1858) 7 Wis. 630: upholding the power of the Wisconsin legislature to cite and imprison for contempt a witness who refused to appear before its joint committee.

C. S. Potts, reporting on his comprehensive study of legislative contempt powers in 1926, affirms that his survey of English and American colonial practice "shows clearly

that it was the generally accepted view that legislative bodies had the inherent right to protect their privileges, their dignity, and their honor by use of the power to punish for contempt." Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. of Pa. L. Rev. 691, 712 (1926). Furthermore, that author says:

> "* * * The precedents were plentiful and had continued down to the outbreak of the struggle for independence. The statesmen of the period were thoroughly familiar with these precedents and regarded the power to punish for contempt as an integral part, or auxiliary, of legislative power. As a necessary result, when they drafted their constitutions, state and national, and conferred the legislative power upon the bodies provided to receive it, they conferred the contempt power along with the rest. This doubtless explains the fact that most of the states, in drafting their new fundamental laws, made no mention whatever of the power to punish for contempt. * * *" Potts, *supra*, pp. 712-713.

Particularly instructive is the author's discussion of instances of the use of legislative contempt power as a "Protective or Defensive Function"; that function, he concludes, is not subject to challenge. Potts, *supra*, pp. 780-795.

B. Due process does not require a trial in cases of direct contempt

If due process of law requires—in the circumstances of this case—that petitioner be given formal notice of charges, time to prepare a defense, opportunity to confront and cross-examine the legislators who judged him and to present evidence in his own behalf before the Assembly, petitioner

did not receive due process. If, however, due process means that petitioner, having placed himself within the jurisdiction of a law-making representative body having contempt powers, was entitled to the formal judgment of that body in accordance with the historical and traditional usages of law, he received due process in full measure.

"The phrase 'due process of law,' " it has been said, "does not necessarily mean a judicial proceeding." *Palmer v. McMahon,* (1890) 133 U.S. 660, 668, 33 L. ed. 772, 10 S. Ct. 324. The Fifth Amendment is said to guarantee no particular form of procedure; it protects, rather, substantial rights: *National Labor Relations Board v. Mackay Radio and Telegraph Co.,* (1938) 304 U.S. 333, 82 L. ed. 1381, 58 S. Ct. 904.

Twice in the last decade this Court has seen fit to reaffirm that "due process" is not defined by pushing buttons on a computer. In *Hannah v. Larche,* (1960) 363 U.S. 420, 4 L. ed. 2d 1307, 80 S. Ct. 1502, the Court cautioned that:

> " '[d]ue process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. * * * Whether the Constitution requires that a particular right obtain in specific proceedings depends upon a complexity of factors. The nature of the alleged right involved, *the nature of the proceeding, and the possible burden on that proceeding,* are all considerations which must be taken into account." (363 U. S. at 442, 4 L. ed. 2d at 1321) (Emphasis respondent's)

Again, in 1969, the Court in *Jenkins v. McKeithen,* (1969) 395 U.S. 411, 23 L. ed. 2d 404, 89 S. Ct. 1843, quoted the above language from the *Hannah* case, and expressly reaffirmed that decision.

This Court's refusal, in *Hannah* and *Jenkins*, to treat due process as a crystallized formulation of "do's" and "don'ts" applicable to all factual contexts is consistent with language found in the opinion of the Court in *Betts v. Brady*, (1942) 316 U.S. 455, 86 L. ed. 1595, 62 S. Ct. 1252:

> "* * * That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed." (316 U.S. at 462, 86 L. ed. at 1602)

Petitioner's conduct, described in the resolution of contempt, constituted a *direct* contempt. Direct contempts necessitate and justify proceedings and judgments different from those which due process would require in cases of contempts committed *outside* the presence of the offended tribunal. As will be seen in the discussion which follows, both courts and legislative bodies possess the power to proceed summarily in cases of direct contempt—in full harmony with the Due Process Clause.

The authorities, in disclosing the source, nature and necessity of the contempt power, clearly demonstrate that, historically and traditionally, courts and legislatures derive their contempt powers from the same basic sources, and exercise them for the same reasons: preservation of their existence and authority. The parallel powers of courts and legislatures respecting contempts is cogently explained by Denman, C. J., in the case of *The Sheriff of Middlesex*, 11 Adol. and El. 273, 39 E.C.L. 170:

> "Instances have been pointed out in which the crown has exerted its prerogative in a manner now considered illegal, and the courts have acquiesced; but the cases are not analogous. The crown has no rights which it can exercise otherwise than by process of law and through amenable officers; but representative bodies must necessarily vindicate their authority by means of their own; and those means lie in the process of committal for contempt. This applies not to the houses of parliament only, but as we observed in *Burdett v. Abbot,* 14 East. 138, to the courts of justice which, as well as the houses, must be liable to continual obstruction and insult if they were not intrusted with such powers. It is unnecessary to discuss the question whether each house of parliament be or be not a court; it is clear they cannot exercise their proper functions without the power of protecting themselves against interference. * * *"

Once it is conceded, as it must be, that the Wisconsin Assembly is a "house having authority to commit," by what authority is it obliged to burden itself with lengthier or more complex procedures than those employed by courts in exercising identical powers? Courts do not, and are not required by the Constitution, to delay judgment or imposition of punishment in cases of direct contempts, but proceed summarily to impose punishment without notice of charges, opportunity to defend or offer explanations, confrontation or cross-examination of "accusers," or jury trials. Neither the Due Process Clause nor any other provision of the federal Constitution has ever been held to prohibit such summary disposition where, as in Fr. Groppi's case, the punishment imposed is no greater than that imposed for petty offenses. Such summary disposition, it has always been held, does not offend against the Due Process Clause.

This Court held, in *Ex Parte Terry,* (1888) 128 U.S. 289, 32 L. ed. 405, 9 S. Ct. 77, that a citizen could be imprisoned for contempt of court in his absence, without notice

of the intention of the court to act and without the citizen's being given an opportunity of being heard in defense, the Court saying:

> " 'If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination.' * * * It is utterly impossible * * * 'that the law of the land can be properly administered if those who are charged with administering it have not power to prevent instances of indecorum from occurring in their own presence.' "

In *Ex Parte Hudgings*, (1919) 249 U.S. 378, 63 L. ed. 656, 39 S.Ct. 337, the Court said:

> "Existing within the limits of and sanctioned by the Constitution, the power to punish for contempt committed in the presence of the court is not controlled by the limitations of the Constitution as to modes of accusation and methods of trial generally safeguarding the rights of the citizen. * * * An obstruction to the performance of judicial duty resulting from an act done in the presence of the court is, then, the characteristic upon which the power to punish for contempt must rest. * * *" (249 U.S. at 383)

In *Cooke v. United States*, (1925) 267 U.S. 517, 69 L. ed. 767, 45 S. Ct. 390, the Court reversed and remanded a contempt citation but noted that:

> "To preserve order in the court room for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court. There is no need of evidence or assistance of counsel before punishment, because the court has seen the offense. Such summary vindication of the court's dignity and authority is necessary. It has always been so in the courts of the common law, *and the punishment imposed is due process of law.*" (Emphasis respondent's)

In *In Re Oliver,* (1948) 333 U. S. 257, 92 L. ed. 682, 68 S.Ct. 499, the Court said:

> "The narrow exception to * * * due process requirements includes only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public. * * *" (333 U.S. at 275)

And in *Fisher v. Pace,* (1949) 336 U.S. 155, 93 L. ed. 569, 69 S.Ct. 425, the Court held that:

> "Historically and rationally the inherent power of courts to punish contempts in the fact of the court without further proof of facts and without aid of jury is not open to question. * * * *Such summary conviction and punishment accords due process of law."* (Emphasis respondent's)

The Wisconsin Supreme Court has, in its rulings, followed the reasoning of the above cases, holding that "summary punishment for civil contempt is permissible only if the conduct occurs in the presence of the court, and in the immediate view of the court. * * * If the conduct occurs before the court, there is no need for further fact-finding. From his own direct observations the court possesses the necessary information to proceed to judgment." *Upper Lakes Shipping v. Seafarers' International Union,* (1963) 22 Wis. 2d 7, 125 N.W. 2d 324; *In Re Adams Rib Inc.,* (1968) 39 Wis. 2d 741, 159 N.W. 2d 643. See also *Rubin v. State,* (1927) 192 Wis. 1, 211 N.W. 926 and *In Re Rosenberg,* (1895) 90 Wis. 581, 63 N.W. 1065.

It would be absurd and unreasonable to hold that petitioner was entitled to "more due process" because he committed acts before a house of the Wisconsin legislature than would

have been accorded him if he had carried out his disruptive and disorderly tactics in a court of law. The Court of Appeals correctly declined to so hold.

C. No relevant distinction exists between courts and legislative bodies regarding their power to punish summarily for contempt

The district court acknowledged that conduct of the type described in the contempt resolution would justify summary commitment—without notice or hearing—if it were observed by a judge in a courtroom. The district court found, however, that there were differences between a judge and a legislative body which made summary commitment by a lone judge constitutionally permissible, but a denial of due process if adjudged by a legislative body. The only differences noted by the district court were:

> (1) "The physical contours of most legislative chambers, the comings and goings of the members, and the diffusion of attention of the members, among many factors, render it improbable that all of the members present would share a uniform perception and evaluation of an incident, upon the basis of which each member might then decide upon an appropriate response." (A. 10/a)
>
> (2) "Unlike many courts of record, frequently if not typically no verbatim written record of legislative proceedings exists. If the availability of judicial review of the contempt citation is assumed, it would nevertheless be severely crippled by the absence of a definitive record of the incident." (A. 101 a-102a)

These conclusions of the district court were not supported by citations of legal authority or by references to scientific treatises. Their validity is open to serious doubt.

First, the district court in effect said that the perception of one witness to an event (or series of events) is more

reliable than the combined perception of many. The ramifications of such a proposition, if accepted, are far-reaching; a jury of one, for example, would be more reliable than a jury of twelve; a district judge could reliably perceive and evaluate contumacious conduct in open court, but the judges of an appellate court, sitting *en banc*, could not. Many other analogies could be cited, but the foregoing should suffice to demonstrate the fallacy of the district court's reasoning. If a choice must be made between the relative reliability of the perceptions of one witness and many witnesses, it would seem that the law should prefer the latter.

As to the second point made by the district court—i.e., the lack of a verbatim record of legislative proceedings—courts as well as legislatures must certainly be aware that contumacious conduct of the most vicious and disruptive sort will not necessarily appear in a transcript of proceedings. Without uttering a word for the written record, persons present in a courtroom or legislative chamber may totally paralyze the court or legislature by gestures, physical violence, facial expressions and countless other non-verbal means.

Similarly, familiar instances of contumacious conduct may occur in court proceedings which are often not recorded verbatim—for example, summations and arguments of legal issues. Certainly the threat of disorderly contempt does not disappear during the absence of a court reporter.

The district court's efforts to find constitutionally meaningful distinctions between legislatures and courts in cases of direct contempt were found not persuasive in the Court of Appeals. They do not merit the approbation of this Court.

D. The limited power of a legislative body to punish summarily for a direct disorderly contempt should not be taken away

It is not out of place to consider here the possible ramifications of the imposition of procedural strictures on legislative contempt powers. The nation has but one Congress; each state has but one legislature. The disorderly obstruction of the work of a single *court* within the nation or a state would rarely affect the welfare or diminish the power of the state or nation, since each is ordinarily served by many courts, whose time is often devoted largely to the resolution of private disputes. But legislative bodies are unique in their political environments; their work affects the public interest at all times, and affects the welfare of all the citizens of the state or nation directly. When a chair is thrown at a judge sitting in a divorce case, other judges and other courts are available to step in while the affected jurist mends — the business of government does not stop. When, in contrast, the work of the legislature is obstructed, no other personnel, no other governmental unit can assume its burden. Which, then, is the more serious threat to the government? Which threat more clearly calls for swift and certain vindication of authority?

A legislative body could, no doubt, postpone its work to try a citizen who has led a physical assault upon its chamber. In that case, the triers of fact would also be the witnesses for the prosecution (an inspiring spectacle) and the defendant would presumably be entitled, from the witness chair, to enlighten his captive audience with the ideas which originally prompted his assault upon it. Would due process require that the defendant be allowed to represent himself? — to interrupt the proceedings with taunts and invective? — to cross-examine for hours at a time? — to call a thousand witnesses?

We do not conjure an extreme case to make a point. Protracted and frequent legislative trials could easily and realistically become a favorite tool in the politics of confrontation and obstruction, to the detriment of representative government.

Even Goldfarb, who advocates drastic limitations of the contempt power, recognizes a clear need for a legislative weapon to deal with physical disorders:

> "Physical disorders should be excluded, as a general rule, from the coverage of this misdemeanor statute. These offenses to governmental operations are better handled through a summary, plenary power, truly inherent in any legitimate working government body, of physical control and expulsion. The position that a government body should have some means of controlling noise, misbehavior and similar physical obstructions in its presence should require little argument and raise less dispute. Certainly a court or a congressional meeting should not be at the mercy of the obstreperous and uncouth. * * *" Goldfarb, *The Contempt Power* (1963), 305-306.

II. The Legislative Contempt Resolution Was Constitutionally Adequate.

The second question presented is one which petitioner raises here for the first time. It is apparently prompted by Judge Kiley's dissent below.

Both petitioner and the American Civil Liberties Union claim that *Ex Parte Terry,* (1888) 128 U.S. 289, 32 L. ed. 405, 9 S. Ct. 77, holds it to be a requirement of the Constitution that a "statement of underlying facts" be incorporated into a resolution upon direct contempt. Petitioner makes the same claim for *Cooke v. United States,* (1925) 267 U.S. 517, 69 L. ed. 767, 45 S. Ct. 390.

These cases do not so hold. Counsel for respondent has searched both reports for language supporting petitioner's claim, without success. Quite to the contrary, both opinions elaborate upon the distinction between procedures followed in cases of direct contempt and those required in contempts outside the presence of the committing tribunal; nothing is said of "underlying facts" in direct contempt cases.

Petitioner's claim that the requirements of Rule 42 (a), Federal Rules of Criminal Procedure, represent codification of a "constitutional requirement" finds no support whatever in the cases cited in support of that claim.

Rule 42 (a) embodies no principle of constitutional law binding upon a state legislature acting in response to a direct contempt. If it did, however, the resolution adopted by the Wisconsin Assembly on October 1, 1969, would not fail to meet its standard; the resolution amply recited the evidentiary facts upon which the judgment of contempt was based.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals for the Seventh Circuit should be affirmed.

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ADDENDUM

The Contempt Resolution

1969 Spec. Sess. ASSEMBLY RESOLUTION 6

September 30, 1969 — Introduced by COMMITTEE ON RULES, by request of Assemblymen Sensenbrenner, Olson, Klicka, Nitschke, McDougal, Parkin, Schwefel, Lynn and Bock.

Citing James E. Groppi for contempt of the Assembly and directing his commitment to the Dane county jail.

In that James E. Groppi led a gathering of perople on September 29, 1969, which by its presence on the floor of the Assembly during a meeting of the 1969 regular session of the Wisconsin Legislature in violation of Assembly Rule 10 prevented the Assembly from conducting public business and performing its constitutional duty; now, therefore, be it

Resolved by the Assembly, That the Assembly finds that the above-cited action by James E. Groppi constituted "disorderly conduct in the immediate view of the house and directly tending to interrupt its proceedings" and is an offense punishable as a contempt under Section 13.26 (1) (b). of the Wisconsin Statutes and Article IV, Section 8 of the Wisconsin Constitution and therefore:

(1) Finds James E. Groppi guilty of contempt of the Assembly; and

(2) In accordance with Sections 13.26 and 13.27 of the Wisconsin Statutes, orders the imprisonment of James E. Groppi for a period of 6 months, or for the duration of the 1969 regular session, whichever is briefer, in the Dane county jail and directs the sheriff of Dane county to seize said person and deliver him to the jailer of the Dane county jail; and, be it further

Resolved, That the Assembly directs that a copy of this resolution be transmitted to the Dane county district attorney for further action by him under Section 13.27 (2) of the Wisconsin Statutes; and, be it further

Resolved, That the attorney general is respectfully requested to represent the Assembly in any litigation arising herefrom.

(End)

Constitutional and Statutory Provisions

Article IV, Section 8, of the Wisconsin Constitution:

"**Rules; contempts; expulsion.** SECTION 8. Each house may determine the rules of its own proceedings, punish for contempt and disorderly behavior, and with the concurrence of two-thirds of all the members elected, expel a member; but no member shall be expelled a second time for the same cause."

Section 13.26 of the Wisconsin Statutes:

"**13.26 Contempt.** (1) Each house may punish as a contempt, by imprisonment, a breach of its privileges or the privileges of its members; but only for one or more of the following offenses:

(a) Arresting a member or officer of the house, or procuring such member or officer to be arrested in violation of his privilege from arrest.

(b) Disorderly conduct in the immediate view of either house or of any committee thereof and directly tending to interrupt its proceedings.

(c) Refusing to attend or be examined as a witness, either before the house or a committee, or before any

person authorized to take testimony in legislative proceedings, or to produce any books, records, documents, papers or keys according to the exigency of any subpoena.

(d) Giving or offering a bribe to a member, or attempting by meanace or other corrupt means or device to control or influence a member in giving his vote or to prevent his giving the same.

(2) The term of imprisonment a house may impose under this section shall not extend beyond the same session of the legislature."

Section 13.27 (1), Wisconsin Statutes:

"**13.27 Punishment for contempt.** (1) Whenever either house of the legislature orders the imprisonment of any person for contempt under s. 13.26 such person shall be committed to the Dane county jail, and the jailer shall receive such person and detain him in close confinement for the term specified in the order of imprisonment, unless he is sooner discharged by the order of such house or by due course of law."